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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 242

B. B. WOODSON, TRUSTEE IN BANKRUPTCY FOR STERLING R. DECKER AND MARY JANE DECKER, PARTNERS t/a BERKELEY COMMUNITY BUILDERS,
Petitioner
against
GEORGE GILMER,
Respondent
and
E. V. ECHOLS, TRUSTEE IN BANKRUPTCY FOR ALBERT MAHANES COMPANY, INCORPORATED, BANKRUPT,
Petitioner
against
GEORGE GILMER,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WILLIAM S. AARON, JR.
WALKER, WOODSON AND AARON
242 Court Square
Charlottesville, Virginia
of Counsel

JAMES H. MICHAEL, JR.
MICHAEL AND DENT
414 Park Street
Charlottesville, Virginia
of Counsel
Attorneys for Petitioners

THE MICHIE COMPANY, PRINTERS
CHARLOTTESVILLE, VA.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully pray for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review an order of that Court entered on April 16, 1964, affirming judgments of the United States District Court for the Western District of Virginia, Charlottesville Division, entered June 3, 1963.

SUMMARY STATEMENT OF MATTERS INVOLVED

FACTS

In early 1957 Sterling R. Decker (Decker) and Mary Jane Decker, partners t/a Berkeley Community Builders (Decker Partnership), began the development of a subdivision in Albemarle County, Virginia, known as "Berkeley".

On May 7, 1957, Commonwealth Utilities, Inc. (Utilities) was chartered by the State of Virginia as a public service corporation. Decker, Mary Jane Decker and George Gilmer (Gilmer) were the sole incorporators, stockholders and directors. Utilities was to and now does furnish water and sewer facilities to "Berkeley".

On December 11, 1961, involuntary petitions in bankruptcy were filed against the persons or entities listed below, at the instance of Gilmer, in the United States

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District Court for the Western District of Virginia at Charlottesville:

Albert Mahanes Company, Inc.
In Bankruptcy No. 705,

Sterling R. Decker
In Bankruptcy No. 706, and

Sterling R. Decker and
Mary Jane Decker, Partners,
t/a Berkeley Community Builders,
In Bankruptcy No. 707.

Each entity was adjudicated a bankrupt on January 12, 1962. The schedules of creditors and proofs of claims thereafter filed indicated Gilmer to be the largest creditor of Bankruptcies No. 706 and 707 and a large creditor of Bankruptcy No. 705.

Prior to the bankruptcy, The Peoples National Bank of Charlottesville (now Virginia National Bank) held notes of Utilities, endorsed by Gilmer, Decker and Mary Jane Decker, aggregating $70,350.00.

Utilities also owed an open account obligation to Decker Partnership, in the sum of $37,132.75, and an open account obligation to Albert Mahanes Company, Inc. (Mahanes) in the sum of $22,086.98.

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA, PROCEEDINGS

On January 31, 1962, Gilmer filed in the Circuit Court of Albemarle County, Virginia, a motion for judgment against Utilities for $70,350.00, or the face amount of the notes described above, plus 15% attorney's fees and interest at 6% from November 15, 1961, the date on which Gilmer had taken up as endorser the notes held by the Peoples National Bank. At this time the first

meeting of creditors of the bankrupts had not been held, nor had a Trustee or Conservator been appointed.

On February 15, 1962, Thomas J. Michie, Jr., was appointed Trustee for Decker Partnership and E. V. Echols was appointed Trustee for Mahanes. Michie later resigned and was succeeded by B. B. Woodson, who had previously been named as Trustee for Decker. Mr. Woodson as Trustee has been represented throughout these proceedings by William S. Aaron, Esquire, of the firm of Walker, Woodson and Aaron, and Mr. E. V. Echols as Trustee has been represented throughout these proceedings by Messrs. James H. Michael, Jr. and Magruder Dent, Jr., of the firm of Michael and Dent. All are of Charlottesville, Virginia.

On February 21, 1962, the respective Trustees, at the suggestion of the Referee, requested that Utilities confess judgment as to its obligations to Decker Partnership and to Mahanes, the request being made to Decker, President of Utilities. Accordingly, on February 21, 1962, Utilities, acting through its President, Decker, confessed judgment in the Clerk's Office of the Circuit Court of Albemarle County, Virginia, for $22,086.98 in favor of the Trustee for Mahanes with interest at 6% on $13,390.04 from December 31, 1960, and with interest at 6% on $8,398.04 from March 31, 1961, and thereafter on the same day in favor of the Trustee for Decker Partnership in the amount of $37,132.75 with interest at 6% from January 1, 1961.

On March 8, 1962, Gilmer was given judgment in the Circuit Court of Albemarle County, Virginia, against Utilities in the amount of $70,350.00 with interest at 6% per annum and attorney's fees in the amount of 15%.

On April 18, 1962, Gilmer, without requesting the consent of the bankrupty court, filed a Bill in Chancery in the Circuit Court of Albemarle County praying that the

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judgments confessed in favor of your petitioners be declared void.

BANKRUPTCY COURT PROCEEDINGS

B. B. Woodson, Trustee, filed on June 1, 1962 a petition praying for the entry of an order enjoining Gilmer from proceeding with his suit in the Circuit Court of Albemarle County wherein Gilmer was attacking an asset of the Decker Partnership bankrupt estate.

E. V. Echols, Trustee, filed on June 30, 1962 a petition also praying for the entry of an order enjoining George Gilmer from proceeding with his suit in the Circuit Court of Albemarle County wherein he was attacking an asset of the Mahanes bankrupt estate.

By order of the Referee (Appendix A), entered April 22, 1963, the petition of E. V. Echols, Trustee, was denied.

By order of the Referee (Appendix B), entered June 3, 1963, the petition of B. B. Woodson, Trustee, was denied.

DISTRICT COURT PROCEEDINGS

These matters came on together to be heard by the United States District Court for the Western District of Virginia upon a Petition for Review and the Referee's Finding of Facts, Conclusion of Law and Certificate in each case and was argued on July 29, 1963. On July 31, 1963 an order was entered in each case (Appendix E, F) by the United States District Judge denying the Trustees' prayers for an order enjoining and restraining Gilmer from proceeding in the Circuit Court of Albemarle County, Virginia, with certain specific findings made in said orders.

COURT OF APPEALS PROCEEDINGS

A notice of appeal to the United States Court of Appeals for the Fourth Circuit was duly filed by B. B. Woodson, Trustee, and was argued on November 9, 1963.

A notice of Appeal to the United States Court of Appeals for the Fourth Circuit was duly filed by E. V. Echols, Trustee, and was argued on January 22, 1964.

The Court of Appeals by order (Appendix G) applicable in each case, dated and entered on April 16, 1964, affirmed the District Court's rulings.

BASIS OF JURISDICTION OF COURT OF FIRST INSTANCE

The basis for federal jurisdiction in the Court of first instance is United States Code, Title 11, Section 95(6).

BASIS OF THIS COURT'S JURISDICTION

The jurisdiction of this Court is invoked under United States Code, Title 28, Section 1254 (1).

No order granting an extension of time within which to petition for certiorari was made or entered in this Court.

The judgment of the Court of Appeals sought to be reviewed was dated and entered on April 16, 1964. (Appendix G) *Woodson v. Gilmer; Echols v. Gilmer,* 331 F. 2d 147 (1964, 4th Circ.)

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QUESTIONS PRESENTED

I

IS IT ERROR NOT TO HOLD, AS A MATTER OF LAW, THAT AN ACCOUNT RECEIVABLE *COMING INTO* POSSESSION OF THE TRUSTEE UPON ADJUDICATION OF BANKRUPTCY AND THEN REDUCED TO JUDGMENT WAS PROPERTY OF THE BANKRUPT ESTATE AND COULD BE ATTACKED IN A STATE COURT *ONLY* AFTER PERMISSION OF THE REFEREE?

II

IS IT ERROR TO HOLD THAT PRIOR PERMISSION OBTAINED FROM THE BANKRUPTCY COURT IS NOT A PREREQUISITE TO INSTITUTING AND MAINTAINING A SUIT IN THE STATE COURT ATTACKING AN ASSET OF THE BANKRUPT'S ESTATE?

III

IS IT ERROR TO HOLD THAT THE REFUSAL OF THE REFEREE TO ENJOIN THE STATE COURT PROCEEDINGS ATTACKING AN ASSET OF THE BANKRUPT ESTATE CONSTITUTED PERMISSION NEVER REQUESTED?

REASONS FOR ALLOWANCE OF THE WRIT

I. The instant decision of the Court of Appeals for the Fourth Circuit is in conflict with the holding of another Circuit which holds that accounts receivable con-

stitute assets coming into the bankrupt estate upon adjudication of bankruptcy.

The District Court found and *held* that "said confessed judgment, does not now, and never did, constitute property in the possession of this Court. . . ." The Opinion of the District Court was affirmed by the Circuit Court of Appeals. This holding is in direct conflict with the holding of the Court of Appeals for the Fifth Circuit *In Re Garden City Parlor Furniture Co.*, 268 F. 318 (1926, 5th Circ.) *cert. den.* 41 S. Ct. 322, 255 U. S. 568, 65 L. Ed. 790. This is an important question that should be resolved. Accounts receivable reduced to judgment in a State Court arise with great frequency in bankruptcy proceedings.

II. The instant decision of the Court of Appeals for the Fourth Circuit is in conflict with decisions of other Circuits which hold that prior permission obtained from the bankruptcy court is a prerequisite to maintaining a suit in a state court attacking an asset of the bankruptcy estate.

The District Court found that "without first having obtained permission of this Court in the bankruptcy proceedings. . . .", Gilmer proceeded against the Trustees' confessed judgments. That Court upheld the Referee on the theory that the refusal of the Referee to enjoin the proceedings in the State Court constituted *nunc pro tunc* permission. This was affirmed by the Court of Appeals for the Fourth Circuit, which affirmation is in direct conflict with the holding of the Seventh Circuit, *In Re Lustron Corp.*, 184 F. 2d 789 (1950, 7th Circ.) *cert. den.* 340 U. S. 946, 71 S. Ct. 531, 95 L. Ed. 682, and of the Fifth Circuit, *Stanolind Oil and Gas Co. v. Logan*, 92 F. 2d 28 (1937, 5th Circ.) *cert. den.* 302 U. S. 763, 58 S. Ct. 409, 82 L. Ed. 592; 303 U. S. 636, 58 S. Ct. 522, 82 L. Ed. 1097.

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This jurisdictional prerequisite has been accepted by the state courts. *Palmer v. Larchmont Co.*, 284 N. Y. 288, 30 N. E. 2d 599, (1940).

ARGUMENT

I.

THE COURT OF APPEALS ERRED IN NOT HOLDING THAT AN ACCOUNT RECEIVABLE IN THE POSSESSION OF THE TRUSTEE UPON ADJUDICATION OF BANKRUPTCY AND THEN REDUCED TO JUDGMENT WAS PROPERTY OF THE BANKRUPT ESTATE AND COULD BE ATTACKED IN A STATE COURT *ONLY* AFTER PERMISSION OF THE REFEREE.

The Trustee, by virtue of Section 70 of the Bankruptcy Act (11 U. S. C. § 110), is upon his qualification "vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title . . . to all of the following kinds of property wherever located . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred. . . ." (Appendix H)

The word "property" is not defined in the Act. For the administration of the Bankrupt Estate it includes both legal and equitable interests. Upon the filing of a petition in bankruptcy, all property in which the bankrupt has, or may claim, an interest passes under the control of the Bankruptcy Court. *Heffron v. Western Loan and Bldg. Co.*, 84 F. 2d 301, (1936, 9th Circ.) *cert. den.* 299 U. S. 597, 57 S. Ct. 189, 81 L. Ed. 440.

Book accounts and receivables constitute property

which passes to the Trustee. *In Re Garden City Parlor Furniture Co., supra.*

The Court of Appeals in the instant cases failed to rule directly on this point but affirmed the ruling of the District Court which held in part that "the said confessed judgment, does not now, and never did, constitute property in the possession of this Court . . ." This action by the Court of Appeals is in direct conflict with the holding of *In Re Garden City Parlor Furniture Co., supra,* since an account receivable (which was involved in the *Garden City* case), when reduced to judgment, does not change its character as property, but is merely more easily collectible through its added status as a recorded lien.

II.

THE COURT OF APPEALS ERRED IN HOLDING THAT PRIOR PERMISSION OBTAINED FROM THE BANKRUPTCY COURT WAS NOT A JURISDICTIONAL PREREQUISITE TO INSTITUTING AND MAINTAINING A SUIT IN THE STATE COURT ATTACKING AN ASSET OF THE BANKRUPT ESTATE.

The general rule is that once the petition in bankruptcy has been filed, another court has no power to seize, attach, fix a lien upon or otherwise affect the bankrupt's property by virtue of proceedings begun thereafter, without first having obtained the consent of the Bankruptcy Court. Vol. 4, *Collier on Bankruptcy* (14th Ed.) at page 973 (Section 70.06). This rule is well exemplified by this expression of the law: "Jurisdiction to administer the estate, once it has attached, draws to the court power to protect the estate not only against waste or fraud but also against all proceedings impinging upon its function

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of discovery of assets and equitable administration of the estate. Suits may be enjoined if they hamper bankruptcy, as when there is a basis for fear that they will be used as instruments or devices to render fraud triumphant or to defeat equal treatment of creditors, the goal of bankruptcy." *In Re Lustron Corp.,* 184 F. 2d 789, 794, (1950, 7th Circ.) *cert. den.* 340 U. S. 946, 71 S. Ct. 531, 95 L. Ed. 682, at page 794.

The same rule has with brevity been expressed as follows: "When the property of a bankrupt has come into custody of the bankruptcy court, no other court has jurisdiction to take over and administer it without the consent of the bankruptcy court." *Stanolind Oil & Gas Co. v. Logan,* 92 F. 2d, p. 31, *supra.*

"Courts of bankruptcy have exclusive jurisdiction over the assets of the bankrupt in possession of the court. They may yield jurisdiction to a state court on the grounds of comity but they are not bound to do so as they are courts of superior and not coordinate jurisdiction." *Baker v. Gregory,* 111 F. 2d 770, (1940, 5th Circ.).

In *Palmer* v. *Larchmont Co.,* 284 N. Y. 288, 30 N. E. 2d 599 (1940), the Trustee instituted a suit in the New York State Court in an effort to adjudicate the parties' rights in certain real property, without first obtaining the consent of the Bankruptcy Court. The Court of Appeals of New York held that the State Court had no jurisdiction over the subject matter of the litigation since prior consent had not been obtained from the bankruptcy court. This was the case even though such consent could have been obtained from the Bankruptcy Court prior to the institution of the action in the State Court.

III.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE REFUSAL OF THE REFEREE TO ENJOIN THE STATE COURT PROCEEDINGS ATTACKING AN ASSET OF THE BANKRUPT ESTATE CONSTITUTED PERMISSION NEVER REQUESTED.

The Bankruptcy Court takes jurisdiction of the property of the Bankrupt on the filing of the petition, which jurisdiction is exclusive unless it is divested by an act of the Bankruptcy Court or is covered by an exception under the Bankruptcy Act itself. The property and judgment here does not come under an exception, nor did the Bankruptcy Court ever divest itself of jurisdiction.

In the present case, the only way the State Court may exercise jurisdiction is for Gilmer to obtain permission prior to instituting suit, which he has not done directly or indirectly, at any time.

The Referee refused to enjoin Gilmer's proceeding, but he did not grant permission to maintain the state action, which permission he might have purported to grant. The Referee went further by reserving the right, assuming Gilmer should persist in the State Court, to determine in the Bankruptcy Court the effect of the result in the State Court. The Referee's Order dated April 22, 1963 (Appendix A) stated, "All of this, as well as the outcome of the present suit pending in the Circuit Court of Albemarle County, will be taken into account in determining the claim filed by Mr. Gilmer in the bankruptcy proceeding."

The Court of Appeals' holding here complained of

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would require a finding that permission by the Referee had been given. The requirement of obtaining consent prior to instituting such state action would be made a nullity, where the Referee, for whatever reason, chose not to enjoin the plaintiff in the State Court. The plain intent of the requirement of permission first obtained is invalidated by this interpretation by the Court of Appeals.

The doctrine of *Nunc Pro Tunc* is recognized by the courts in most if not all jurisdictions. The analysis of the theory, purpose and effect of *nunc pro tunc* orders or other pleadings in American Jurisprudence, Vol. 37 Motions § 30, reveals it to be a corrective device for errors, omissions, or other failures of judicial officers, the lack of which could or would jeopardize an end of justice. It is not a device for correcting jurisdictional omissions of litigants.

In the instant case we find no error, omissions, or other failures on the part of judicial officers, clerks, and the like, but the mere fact that the Referee was not requested to give permission, nor did he give permission, prior to the institution of the suit.

The right of the State Court to exercise its jurisdictional power did not exist at the time Gilmer instituted his suit. This lack of jurisdictional power is not based upon any errors, omissions, or other failures of judicial officers. It follows that a *nunc pro tunc* order may not be used to breathe life into a proceeding that never had life. The defect in the power of the state court to proceed cannot be cured by consent of the parties or by waiver.

An order *nunc pro tunc*, permissive though it may be, cannot validate a state court proceeding where prior permission to initiate the proceeding was not obtained from the bankruptcy court.

The law seeks where possible to make certain and clear the rights and duties of those affected by it. Bankruptcy law and the law of creditors' rights generally has been of intensely satisfying interest to the lawyer because of its relative certainty and definiteness of scope and of operation within that scope. It is in addition of special value to the business community to maintain as much certainty in the law of bankruptcy as possible. Here the language of the Act is clear beyond cavil. State court proceedings in these circumstances shall be undertaken only after the consent of the bankruptcy court to do so has been first obtained. It is unfortunate indeed that the inescapable effect of the opinion of the Court of Appeals for the Fourth Circuit is to make unclear and uncertain one area of the law where we have heretofore had certainty and clarity.

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CONCLUSION AND PRAYER

For the reasons set forth in this petition it is respectfully submitted that this application for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted, to the end that this cause may be reviewed and determined by this Court; that the final order and judgment of the United States Court of Appeals for the Fourth Circuit may be reversed and that petitioners be granted such other and further relief as this Court may deem proper.

Respectfully Submitted

B. B. Woodson, Trustee, etc.

E. V. Nichols, Trustee, etc.

Dated: Charlottesville, Virginia

June 20, 1964

William S. Aaron, Jr.

Walker, Woodson and Aaron
242 Court Square
Charlottesville, Virginia
of Counsel

James H. Michael, Jr.

Michael and Dent
414 Park Street
Charlottesville, Virginia
of Counsel
Attorneys for Petitioners

I, ..., do hereby certify that three (3) copies of the within Petition for a Writ of Certiorari have been this 20th day of June 1964 delivered to the offices of Carl E. Hennrich, Esquire, Court Square Building, Charlottesville, Virginia, counsel of record for the Respondent.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
VIRGINIA, CHARLOTTESVILLE
DIVISION

IN THE MATTER OF
ALBERT MAHANES COMPANY,
INCORPORATED, Bankrupt
IN BANKRUPTCY NO. 705

ORDER—GEORGE GILMER SUIT

At Harrisonburg, Virginia, in said District, on the 22nd day of April, 1963.

On March 11, 1963 a hearing was held for the purpose of determining whether Mr. George Gilmer should be enjoined from continuing with a suit instituted by him in the Circuit Court of Albemarle County subsequent to the adjudication of bankruptcy, against E. V. Echols, Trustee in Bankruptcy for Albert Mahanes Company, Incorporated, Sterling R. Decker and others.

FINDING OF FACTS

Albert Mahanes Company, Incorporated, was on January 12, 1962 adjudged a bankrupt upon an involuntary petition filed on December 11, 1962 by George Gilmer, M. S. Jackson, t/a H. T. Ferron, Charlottesville Oil Company, Inc. and R. A. Yancey Lumber Company, Inc. The bankrupt's schedule was filed on February 12, 1962. The first meeting of the creditors was held on February 15, 1962.

On January 31, 1962 Mr. Gilmer filed in the Circuit Court of Albemarle County a motion for judgment

against Commonwealth Utilities, Inc., a debtor supposedly common to George Gilmer, Sterling R. Decker and Mary Jane Decker, t/a Berkeley Community Builders, and Albert Mahanes Company, Incorporated. This motion for judgment was for $70,350.00, plus costs and collection fee of 15%.

Mr. Gilmer was a stockholder in Commonwealth Utilities, Inc., and was at the time of the institution of the suit a member of the Board of Directors of Commonwealth Utilities, Inc., and had been a Director for a number of years. Mr. Gilmer was also an officer of the corporation. Mr. Gilmer had been counsel for Albert Mahanes Company, Incorporated, for several years and likewise had been counsel for Sterling R. Decker and Mary Jane Decker, t/a Berkeley Community Builders for several years prior to the filing of the involuntary bankruptcy petition against them.

The record in these various proceedings shows that Mr. Gilmer was quite familiar with the financial condition of Albert Mahanes Company, Incorporated, as well as with the financial condition of the related businesses. We use the term "related businesses" in the sense that Sterling R. Decker, Mr. Gilmer's client, was one of the guiding forces in Commonwealth Utilities, Inc., Albert Mahanes Company, Incorporated and Berkeley Community Builders.

It is true that Albert Mahanes Company, Incorporated did not list in its schedule, filed in accordance with the order entered in this proceeding on January 12, 1962, an account due from Commonwealth Utilities, Inc. It was later brought out in evidence that Commonwealth Utilities, Inc. is indebted to Albert Mahanes Company, Incorporated in the amount of $22,085.98, plus interest.

At the first meeting of the creditors in this bankruptcy

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proceeding a question was raised as to whether any remedy was available to the Trustee to prevent Mr. Gilmer from obtaining judgment against Commonwealth Utilities, Inc., until after the Trustee in Bankruptcy for Albert Mahanes Company, Incorporated could determine the status of the accounts between Commonwealth Utilities, Inc. and Albert Mahanes Company, Incorporated. The Referee suggested that the Trustee explore the possibility of having Commonwealth Utilities, Inc., confess judgment in favor of Albert Mahanes Company, Incorporated, for the amount owed.

On February 21, 1962 Commonwealth Utilities, Inc., confessed judgment in the Clerk's Office of the Circuit Court of Albemarle County, Virginia in favor of E. V. Echols, Trustee in Bankruptcy for Albert Mahanes Company, Incorporated, in the amount of $22,085.98, plus interest and costs as therein provided.

On April 18, 1962, without first having obtained permission in the bankruptcy proceeding, George Gilmer filed in the Circuit Court of Albemarle County, Virginia a bill of complaint against E. V. Echols, Trustee in Bankruptcy for Albert Mahanes Company, Incorporated, and others. The object and purpose of this suit was to have said confessed judgment determined to be null and void. On or about June 7, 1960 E. V. Echols, Trustee filed an answer to George Gilmer's bill of complaint.

On June 30, 1962 the Trustee filed a petition in this proceeding seeking the entry of an order enjoining and restraining George Gilmer from proceeding with the suit instituted by him in the Circuit Court of Albemarle County, to which petition George Gilmer filed an answer on July 7, 1962. For various reasons a hearing was not held on the petition and answer until March 11, 1963.

Any indebtedness owed by Commonwealth Utili-

ties, Inc., to Albert Mahanes Company, Incorporated, whether listed in the bankrupt's schedule or not, is an asset in this proceeding, and title thereto vested in the Trustee.

Mr. Gilmer, in view of his relationships, as hereinbefore set out, is not in the same position as an ordinary creditor. He owed to the bankrupt and to Commonwealth Utilities, Inc., and to the creditors of each of these corporations, a higher degree of fidelity than is owed to the corporations by an ordinary creditor.

CONCLUSION

Section 2a (15) of the Bankruptcy Act gives to a Referee authority, among other things, to enjoin suits instituted against the bankrupt after the adjudication, even though the suit involved a non-dischargeable debt. *Bloenecke v. Applegate*, 271 F. 595.

Since Mr. Gilmer did not seek or obtain permission in the bankruptcy proceeding before instituting the suit against the Trustee and Sterling R. Decker, it is doubtful that the Circuit Court of Albemarle County has jurisdiction to grant the relief prayed for. There is ample authority to support the proposition that the obtaining of consent in the bankruptcy proceeding is jurisdictional. *Isaacs v. Hobbs Tie and Timber Co.*, 51 S. Ct. 270.

We believe that in the instant proceeding Mr. Gilmer should be permitted to prosecute said suit to a conclusion, without expressing any opinion in the bankruptcy proceeding as to whether the outcome of the case in the Circuit Court of Albemarle County will or will not be binding in the bankruptcy proceeding.

The Referee is definitely persuaded that Mr. Gilmer's action in initially instituting his suit against Commonwealth Utilities, Inc., before a Trustee had been appointed

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in the Albert Mahanes Company, Incorporated was motivated by his desire to seek an advantage over other creditors, particularly Albert Mahanes Company, Incorporated, of Commonwealth Utilities, Inc. Mr. Gilmer in his various official capacities certainly knew that Commonwealth Utilities, Inc., was indebted to Albert Mahanes Company, Incorporated. It also must be borne in mind that Mr. Gilmer instituted the suit against Commonwealth Utilities, Inc., prior to the filing of a schedule by the bankrupt. All of this, as well as the outcome of the present suit pending in the Circuit Court of Albemarle County, will be taken into account in determining the claim filed by Mr. Gilmer in this bankruptcy proceeding.

> "The jurisdiction of the bankruptcy court is exclusive of all other courts as to the allowance, or disallowance of claims." *Pepper v. Litton,* 60 S. Ct. 238.

Under Section 2a (2) and Section 57 of the Bankruptcy Act claims may be disallowed on equitable grounds.

By an order entered on October 17, 1962 in the bankduptcy proceedings of Sterling R. Decker, No. 706, and Sterling R. Decker and Mary Jane Decker, Partners, t/a Berkeley Community Builders, No. 707, Mr. Gilmer was enjoined and restrained from proceeding further with said action in the Circuit Court of Albemarle County against Sterling R. Decker.

ORDER

It is ORDERED that George Gilmer be, and he is hereby, enjoined and restrained from proceeding further in the Circuit Court of Albemarle County, Virginia against Sterling R. Decker.

Without expressing any opinion as to what effect the ultimate decision of the Circuit Court of Albemarle County in said suit may have in the bankruptcy proceeding, it is ORDERED that the petition of the Trustee seeking the entry of an order enjoining and restraining George Gilmer from proceeding with said suit, be, and the same is hereby, dismissed.

It is further ORDERED that in the determination of the amount owed by the bankrupt to George Gilmer, on the proof of claim filed by George Gilmer, all the equitable principles involved, as well as the legal principles involved, will be considered.

/s/ JULIAN K. HICKMAN
Referee in Bankruptcy

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA CHARLOTTESVILLE DIVISION

IN THE MATTER OF
Sterling R. Decker and
Mary Jane Decker, Partners,
t/a Berkeley Community Builders,

Bankrupts

In Bankruptcy No. 707

ORDER

At Harrisonburg, Virginia, in said District, on June 3, 1963.

On June 1, 1963, the Trustee in this proceeding filed a petition in which he prays for the entry of an order enjoining George Gilmer from proceeding with a suit in the Circuit Court of Albemarle County, Virginia, against the Trustee in this proceeding.

Sterling R. Decker and Mary Jane Decker, Partners, t/a Berkeley Community Builders, were on January 12, 1962, adjudged bankrupts upon an involuntary petition filed against them by George Gilmer and others.

On January 31, 1962, George Gilmer filed suit against Commonwealth Utilities, Inc., a creditor supposedly common to George Gilmer, Albert Mahanes Company, Inc., and Sterling R. Decker and Mary Jane Decker, Partners, t/a Berkeley Community builders. The object and purpose of this proceeding was to recover $70,350.00 plus collection commissions, costs and interest.

At the first meeting of the creditors held on February 15, 1962, a question was raised as to what course of action should be followed by the Trustee in Bankruptcy for Sterling R. Decker and Mary Jane Decker, Partners, t/a Berkeley Community Builders, to protect the bankrupt's claim against Commonwealth Utilities, Inc. The Referee suggested that the possibility of Decker as President of Commonwealth Utilities, Inc., to confess judgment in favor of the Trustee should be explored. On February 21, 1962, judgment was confessed in favor of the Trustee.

On April 18, 1962, Mr. Gilmer, without having first obtained permission so to do, instituted suit in the Circuit Court of Albemarle County, Virginia, for the purpose of having the confessed judgment declared null and void. Gilmer sought no other relief in this proceeding. The Bill of Complaint filed by him for this purpose did not pray for a determination as to whether an indebtedness existed.

On May 12, 1962, an order was entered in this proceeding dealing with the suit instituted by Gilmer as follows:

> "It is further ORDERED that B. B. Woodson, Trustee, file such pleadings and defend said suit in such manner and to such an extent as he may deem appropriate, proper and advisable for the protection of the interest of this bankruptcy estate."

In the opinion of the Referee the administration of the bankruptcy proceeding will not be unreasonably interfered with by permitting Mr. Gilmer to proceed with the suit instituted by him in the Circuit Court of Albemarle County to test the validity of said confessed judgment. No determination is being made at this time as to

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whether the outcome of the proceedings in the Circuit Court of Albemarle County will or will not be binding in the bankruptcy proceeding.

The Trustee has indicated that if the decision in this proceeding is adverse to him he will file a petition for review.

ORDER

It is ORDERED that the Trustee's petition for the entry of an order enjoining and restraining Gilmer from proceeding with said suit in the Circuit Court of Albemarle County, Virginia, be, and the same is hereby, denied.

The Trustee having indicated that he will file a petition for review of this order which is adverse to him, and having requested the entry of a temporary injunction enjoining and restraining Gilmer from proceeding with said suit until a petition for review can be heard, it is, accordingly, ORDERED that Mr. Gilmer be, and he is hereby, enjoined from proceeding with said suit in the Circuit Court of Albemarle County, Virginia, until a petition for review of this order has been heard and determined by the District Judge, or until the entry of a further order. This temporary injunction shall be automatically dissolved if a petition for review of this order is not filed within the statutory period. (*Peck vs. Howard*, 130 F 2d 1001; *Sproul vs. Gambone*, 34 F Supp 441)

JULIAN K. HICKMAN
Referee in Bankruptcy

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
VIRGINIA, CHARLOTTESVILLE
DIVISION

IN THE MATTER OF
ALBERT MAHANES COMPANY,
INCORPORATED, Bankrupt
IN BANKRUPTCY NO. 705

To the Honorable Thomas J. Michie, Judge of said Court:

REFEREE'S FINDING OF FACTS, CONCLUSIONS OF LAW, AND CERTIFICATION

On May 1, 1963 Mr. George Gilmer filed a petition for review of an order entered by the Referee in this proceeding on April 22, 1963. On May 1, 1963 the Trustee in Bankruptcy for Albert Mahanes Company, Incorporated likewise filed a petition for review of the same order.

PARTIES

E. V. Echols, *Trustee in Bankruptcy*
1332 Rugby Road
Charlottesville, Virginia
Michael and Dent, *Attorneys for Trustee*
Attorneys at Law
414 Park Street
Charlottesville, Virginia
George Gilmer, *Creditor*
Attorney at Law
Charlottesville, Virginia

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Carl E. Hennrich, *Attorney for Mr. Gilmer*
Attorney at Law
Court Square Building
Charlottesville, Virginia

ISSUE

Does the Referee in Bankruptcy have jurisdiction to enjoin the prosecution of a suit, instituted without first having obtained permission in the bankruptcy proceeding, against the bankrupt, or the Trustee in Bankruptcy?

FINDING OF FACTS

The order entered in this proceeding on April 20, 1963 contains a summary of a portion of the facts on which the order was founded.

For the purpose of this certification in connection with the petition for review additional facts should be reported as follows:

The suit instituted by Mr. Gilmer on May 18, 1962 in the Circuit Court of Albemarle County is against Thomas J. Michie, Jr., Trustee in Bankruptcy for Sterling R. Decker and Mary Jane Decker, t/a Berkeley Community Builders; E. V. Echols, Trustee in Bankruptcy for Albert Mahanes Company, Incorporated; Commonwealth Utilities, Inc.; and Sterling R. Decker. Subsequent to the institution of this suit Mr. Thomas J. Michie, Jr. resigned as Trustee and B. B. Woodson was substituted in his place and stead as Trustee in Bankruptcy for Sterling R. Decker and Mary Jane Decker, t/a Berkeley Community Builders. The object and purpose of this suit was to have the court set aside as null and void the judgment confessed by Commonwealth Utilities, Inc., through Sterling R. Decker, its President, in favor of E. V. Echols, Trustee in Bankruptcy for Albert Mahanes Com-

pany, Incorporated. This judgment was confessed on February 21, 1962. In the bill of complaint Mr. Gilmer alleged that Sterling R. Decker was without authority from Commonwealth Utilities, Inc., to confess a judgment against it, and that "no real indebtedness" existed; however the only relief sought by the prayer of the bill of complaint is a determination by the court that the judgment is null and void, and no prayer was made that the merits of the alleged indebtedness be determined.

The entire record in this proceeding shows that Mr. Gilmer was counsel for Albert Mahanes for several years. There is nothing in the record to show how much or how little work he did for Albert Mahanes Company, Incorporated. It is true that the corporation was represented by Robert M. Musselman at the time of the filing of a petition in the Corporation Court of the City of Charlottesville, Virginia, on which petition a State Receiver was appointed on November 27, 1961.

Mr. Gilmer in his petition for review, takes several exceptions to the Referee's Finding of Facts.

The record in this proceeding and in the Decker proceedings abundantly establishes that there was an intertwining of the relationships between Albert Mahanes Company, Incorporated, Deckers and Commonwealth Utilities, Inc. Commonwealth Utilities, Inc. is a public service corporation, and probably this is the only reason why it is not in bankruptcy. The evidence establishes most convincingly that Mr. Gilmer was a guiding force and that he was quite familiar with the businesses. Between October 27, 1954 and March 27, 1961 Mr. Gilmer charged 6% per annum for endorsing promissory notes executed by Decker and promissory notes endorsed by Decker for Albert Mahanes Company, Incorporated and Commonwealth Utilities, Inc. After March 27, 1961 this

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sale of credit by Mr. Gilmer to Decker was reduced to 3% per annum.

CONCLUSIONS OF LAW

The final portion of the order entered on April 22, 1963 is not adverse to Mr. Gilmer, except insofar as he was enjoined and restrained from proceeding further in the Circuit Court of Albemarle County, Virginia against Sterling R. Decker, individually. Gilmer was not enjoined and restrained from proceeding with said suit for the purpose of determining the efficacy of the judgment confessed by Commonwealth Utilities, Inc., through Sterling R. Decker, its President, in favor of the Trustee in Bankruptcy for Albert Mahanes Company, Incorporated.

That portion of the order dealing with the proof of claim filed by Gilmer in this proceeding is not a final order, subject to a petition for review.

Whether one who institutes a suit against a Trustee in Bankruptcy without first having obtained permission so to do should be enjoined and restrained from proceeding with such suit rests largely in the discretion of the Referee, or the Judge, if the bankruptcy proceeding is pending before the District Judge. *Marion Corporation, Joseph D. Casalaro and Robert C. Hunt v. Miles Spence Bray, Trustee*, Fourth Circuit, Decided June 18, 1956, 235 F. 2d 318.

To permit Mr. Gilmer to proceed with the suit instituted by him in the Circuit Court of Albemarle County to test the validity of said confessed judgment will not unreasonably interfere with the administration of the bankrupt's estate. An order entered by the Circuit Court of Albemarle County in said suit holding that the confessed judgment is null and void will not necessarily be

determinative as to the status of the indebtedness existing between Commonwealth Utilities, Inc., and the Trustee in Bankruptcy for Albert Mahanes Company, Incorporated. This statement is subject to many qualifications and exceptions which we need not delineate in this certification.

Congress has not seen fit to confer upon a Court of Bankruptcy exclusive jurisdiction to adjudicate every question which may arise in connection with the estate of a bankrupt. However, its jurisdiction over property of a bankrupt of which it has acquired possession, either actual or constructive, is exclusive. *Murphy v. John Hoffman Co.*, 211 U. S. 562, 29 S. Ct. 154; *Herbert v. Crawford*, 228 U. S. 204, 33 S. Ct. 484.

It has been held that State Courts have jurisdiction of suits against a Trustee in Bankruptcy to determine title to property over which the Trustee did not acquire actual or constructive possession. *Bardes v. Howarden First National Bank*, 178 U. S. 524, 20 S. Ct. 1000.

Mr. Gilmer should be permitted to test the validity of said confessed judgment in the State Court. Mr. Gilmer should not be permitted to continue with his suit against Sterling R. Decker, individually.

Mr. Gilmer, in his petition for review, makes this statement:

> "George Gilmer is aggrieved by Referee's enjoining and restraining him from proceeding further in the Circuit Court against Sterling R. Decker. Gilmer's petition for review of the October 17, 1962 order has not been ruled upon by the District Court. Referee's order of October 17, 1962 has now been reopened by the Referee's order of April 22, 1963 and Gilmer petitions for review of the order of April 22, 1963 upon the same ground as his petition for review of November 2, 1962."

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The order of October 17, 1962 to which Mr. Gilmer refers in the instant petition for review was entered in the bankruptcy proceeding of Sterling R. Decker, No. 706, and the bankruptcy proceeding of Sterling R. Decker and Mary Jane Decker, Partners, t/a Berkeley Community Builders, No. 707. By this order of October 17, 1962 Gilmer was enjoined and restrained from proceeding further in the Circuit Court of Albemarle County, Virginia against Sterling R. Decker. Gilmer did not file a petition for review of the order of October 17, 1962 until November 2, 1962.

The order entered by the Referee in the Albert Mahanes proceeding enjoined and restrained Gilmer from proceeding further in the Circuit Court of Albemarle County against Sterling R. Decker, individually. This order did not deal with the merits of the Decker bankruptcy proceeding, and did not, therefore, re-open for further consideration and determination the order of October 17, 1962.

RECORD CERTIFIED

In connection with these petitions for review the following record is hereby certified:

(1) Photostatic copy of the bill of complaint filed by Gilmer in the Circuit Court of Albemarle County;

(2) Photostatic copy of an undated and unsigned order, supposedly entered by the Circuit Court of Albemarle County;

(3) Photostatic copy of answer of Trustee filed in the Circuit Court of Albemarle County;

(4) Petition filed by the Trustee on June 30, 1962;

(5) Answer filed by Mr. Gilmer on July 7, 1962;

(6) Order entered on November 29, 1962;

(7) Petition filed by Mr. Gilmer December 3, 1962;

(8) Order entered on December 4, 1962;

(9) Order entered February 26, 1963;

(10) Brief filed by Attorney for Trustee on March 23, 1963;

(11) Brief filed by Mr. Gilmer on April 1, 1963;

(12) Reply brief filed by Attorney for Trustee on April 1, 1963;

(3) Additional brief filed by Mr. Gilmer on April 3, 1963;

(14) Order entered on April 22, 1963;

(15) Petition for review filed by Mr. Gilmer on May 1, 1963;

(16) Petition for review filed by Attorney for Trustee on May 1, 1963.

Respectfully submitted on this 21st day of May, 1963.

/s/ JULIAN K. HICKMAN
Referee in Bankruptcy

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APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
VIRGINIA
CHARLOTTESVILLE DIVISION

IN THE MATTER OF
Sterling R. Decker and
Mary Jane Decker, Partners,
t/a Berkeley Community Builders,

Bankrupts

In Bankruptcy No. 707

To The Honorable Thomas J. Michie, Judge of said Court:

REFEREE'S FINDING OF FACTS, CONCLUSIONS OF LAW, AND CERTIFICATION

On June 3, 1963, an order was entered in this proceeding which was adverse to the Trustee. On June 13, 1963, the Trustee in Bankruptcy for Sterling R. Decker and Mary Jane Decker, Partners, t/a Berkeley Community Builders, filed a petition for review of said order.

PARTIES

B. B. Woodson, *Trustee in Bankruptcy*
Attorney at Law
242 Court Square
Charlottesville, Virginia
William S. Aaron, Jr., *Attorney for Trustee*
Attorney at Law
242 Court Square
Charlottesville, Virginia

George Gilmer, *Creditor*
Attorney at Law
Charlottesville, Virginia
Carl E. Hennrich, *Attorney for Mr. Gilmer*
Attorney at Law
Court Square Building
Charlottesville, Virginia

ISSUE

Should George Gilmer be restrained from prosecuting a suit, instituted by him in the Circuit Court of Albemarle County, Virginia, without first having obtained permission in the bankruptcy proceeding, against the Trustee in Bankruptcy?

FINDING OF FACTS

The facts relative to this matter are set forth in the order dated June 3, 1963.

CONCLUSIONS OF LAW

Whether one who institutes suit against a Trustee in Bankruptcy without first having obtained permission in the bankruptcy proceeding should be enjoined and restrained from proceeding with said suit rests largely in the discretion of the Referee, or the Judge if the bankruptcy proceeding is pending before the District Judge. *Marion Corporation, Joseph D. Casalaro and Robert C. Hunt v. Miles Spence Bray, Trustee,* Fourth Circuit, Decided June 18, 1956, 235 F. 2d 318.

Congress has not seen fit to confer upon a Referee in Bankruptcy, or the District Court, exclusive jurisdiction to adjudicate every question which may arise in connection with the estate of a bankrupt. However, the Referee has exclusive jurisdiction over property of a bankrupt in

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either actual or constructive possession. *Murphy vs. John Hoffman Company*, 211 U.S. 562, 29 S. Ct. 154; *Herbert vs. Crawford*, 228 U.S. 204, 33 S. Ct. 484.

It has been held that State Courts have jurisdiction of suits against a Trustee in Bankruptcy to determine title to property over which the Trustee did not acquire actual or constructive possession. *Bardes vs. Howarden First National Bank*, 178 U.S. 524, 20 S. Ct. 1000.

Mr. Gilmer should be permitted to test in the State Court the validity of said confessed judgment.

Mr. Gilmer has already been enjoined and restrained from proceeding further in the State Court against Sterling R. Decker, individually.

RECORD CERTIFIED

(1) Petition filed by the Trustee on June 1, 1963.
(2) Answer to petition signed by Mr. Gilmer on June 3, 1963, but actually received in this office on June 4, 1963.
(3) Order entered on June 3, 1963.
(4) Petition for review filed by Trustee on June 13, 1963.

Respectfully submitted on this 12th day of June, 1963.

JULIAN K. HICKMAN
Referee in Bankruptcy

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT CHARLOTTESVILLE, ON THE 31st DAY OF JULY, 1963.

In the matter of:
STERLING R. DECKER, et al,
Bankrupts,
In Bankruptcy No. 707.
} *ORDER.*

Upon the petition of B. B. Woodson, Trustee, for a review of the Referee's order entered herein on June 3, 1963, filed herein on June 13, 1963, for reasons set out in said petition, oral argument of counsel in support of and in opposition to said petition was heard at Lynchburg on July 29, 1963. The Court at that time not being fully advised of its judgment, took time to consider.

Upon consideration whereof, the Court now being fully advised of its judgment, it is hereby found by the Court that the only questions raised by said petition and now before the Court are the propriety of that part of the Referee's order ordering,

> "That the Trustee's petition for the entry of an order enjoining and restraining Gilmer from proceeding with said suit in the Circuit Court of Albemarle County, Virginia, be, and the same is hereby, denied.",

the recital of the Referee in said order,

> "In the opinion of the Referee the administration of the bankruptcy proceedings will not

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be unreasonably interfered with by permitting Mr. Gilmer to proceed with the suit instituted by him in the Circuit Court of Albemarle County to test the validity of said confessed judgment.",

and the Referee's certification that,

"Mr. Gilmer should be permitted to test in the State Court the validity of said confessed judgment."

The court further finds that, after the adjudication of the bankrupts herein on January 12, 1962, and the appointment of a trustee, Commonwealth Utilities, Inc., confessed judgment in the Clerk's Office of the Circuit Court of Albemarle County, Virginia, in favor of the Trustee on February 21, 1962, in the sum of $37,132.75, with interest and costs. Subsequently, on March 8, 1962, George Gilmer obtained a judgment against Commonwealth Utilities, Inc., in the Circuit Court of Albemarle County, Virginia, in the sum of $70,350.00, with interest, costs and attorneys' fees. Thereafter, on April 18, 1962, without first having obtained permission from this Court in the bankruptcy proceedings, George Gilmer instituted in the Circuit Court of Albemarle County, Virginia, an action against Thomas J. Michie, Jr., Trustee herein, E. V. Echols, Trustee, Commonwealth Utilities, Inc., and Sterling R. Decker, the object and purpose of the suit being to have said confessed judgment determined to be null and void. (Later, Thomas J. Michie, Jr., resigned as Trustee, and B. B. Woodson was appointed Trustee in his stead.) George Gilmer has heretofore been enjoined from prosecuting this action against Sterling Decker, individually, that order has become final, and Sterling Decker, individually, has been dismissed as a party defendant. The question now before the court is

whether George Gilmer should be restrained from prosecuting his action in the State Court against Woodson, Trustee, and the other defendants, and securing an adjudication therein of the validity, or nonvalidity, of said confessed judgment.

The Court further finds that, although no permission of this Court was first obtained by George Gilmer for the institution of his said action in the State Court, the order and certification of the Referee now under review constitute permission *nunc pro tunc* of this Court for the prosecution of said action, and that the subject matter of said State Court action, that is to say, the said confessed judgment, does not now, and never did, constitute property in the possession of this court, and further, that the determination of the question of whether or not said confessed judgment is valid, is peculiarly a question of State law.

It is therefore

ORDERED

that the petition for review of B. B. Woodson, Trustee, be, and the same is, hereby overruled, and that the Referee's certification that,

> "Mr. Gilmer should be permitted to test in the State Court the validity of said confessed judgment.",

and his order of June 3, 1963, refusing to enjoin and restrain George Gilmer from proceeding with said suit to determine the validity or nonvalidity of said confessed judgment, be, and the same are, hereby in all respects ratified and confirmed; to which action of the Court, B. B. Woodson, Trustee, objected and excepted upon grounds fully stated to the Court.

The Deputy Clerk at Lynchburg will certify and mail

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copies of this order to Hon. Julian K. Hickman, Referee in Bankruptcy, Harrisonburg, Va., E. V. Echols, Esq., 1332 Rugby Road, Charlottesville, Va., B. B. Woodson, Esq., 242 Court Square, Charlottesville, Va., Magruder Dent, Jr., Esq., Michael & Dent, 414 Park Street, Charlottesville, Va., Carl E. Hennrich, Esq., Court Square Building, Charlottesville, Va., William S. Aaron, Esq., 242 Court Square, Charlottesville, Va., and Robert M. Musselman, Esq., 413 Seventh Street, Charlottesville, Va.

Enter:

A. D. BARKSDALE
United States District Judge.

A TRUE COPY, TESTE:
LEIGH B. HANES, JR., *Clerk,*
By Otway Petticreu
Deputy Clerk.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT CHARLOTTESVILLE, ON THE 31st DAY OF JULY, 1963.

In the matter of:
ALBERT MAHANES COMPANY, INC.,
In Bankruptcy No. 705.
} ORDER.

Upon the petitions of E. V. Echols, Trustee, and George Gilmer, a creditor, both filed herein on May 1, 1963, to review the Referee's order entered herein on April 22, 1963, for reasons set out in said petitions, oral argument of counsel in support of and in opposition to said petitions was heard at Lynchburg on July 29, 1963. The Court at that time not being fully advised of its judgment, took time to consider.

Upon consideration whereof, the Court being now fully advised of its judgment, it is hereby found by the Court that the only questions properly raised by said petitions and now before the Court are the propriety of that part of the Referee's order ordering,

> "that the petition of the Trustee seeking the entry of an order enjoining and restraining George Gilmer from proceeding with said suit, be, and the same is hereby dismissed.",

the recital of the Referee in said order,

> "We believe that in the instant proceeding Mr. Gilmer should be permitted to prosecute said suit to a conclusion. . . .",

and the Referee's certification that,

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"Mr. Gilmer should be permitted to test the validity of said confessed judgment in the State Court.".

The Court further finds that, after the adjudication of the bankrupt herein on January 12, 1963, and the appointment of a trustee, Commonwealth Utilities, Inc., confessed judgment in the Clerk's Office of the Circuit Court of Albemarle County, Virginia, in favor of E. V. Echols, Trustee herein, on February 21, 1962, in the amount of $22,085.98, with interest and costs. Subsequently, on March 8, 1962, George Gilmer obtained a judgment against Commonwealth Utilities, Inc., in the Circuit Court of Albemarle County in the sum of $70,350.00, with interest, costs and attorneys' fees. Thereafter, on April 18, 1962, without first having obtained permission from this court in the bankruptcy proceeding, George Gilmer instituted in the Circuit Court of Albemarle County, an action against E. V. Echols, Trustee, Thomas J. Michie, Jr., Trustee, Commonwealth Utilities, Inc., and Sterling R. Decker, the object and purpose of the suit being to have said confessed judgment determined to be null and void. George Gilmer has heretofore been enjoined from prosecuting this action against Sterling Decker, individually, that order has become final, and Sterling Decker, individually, has been dismissed as a party defendant. The question now before the Court is whether George Gilmer should be restrained from prosecuting his action in the State Court against Echols, Trustee, and the other defendants, and securing an adjudication therein of the validity, or nonvalidity, of said confessed judgment.

The Court further finds that, although no permission of this Court was first obtained by George Gilmer for the institution of his said action in the State Court, the order and certification of the Referee now under review consti-

tute permission *nunc pro tunc* of this Court for the prosecution of said action, and that the subject matter of said State Court action, that is to say, the said confessed judgment, does not now, and never did, constitute property in the possession of this Court, and further, that the determination of the question of whether or not said confessed judgment is valid, is peculiarly a question of State law.

It is hereby

ORDERED

that the petition for review of E. V. Echols, Trustee, be, and the same is hereby, overruled, and that the Referee's certification that,

> "Mr. Gilmer should be permitted to test the validity of said confessed judgment in the State Court.".

and his order of April 22, 1963, refusing to enjoin and restrain George Gilmer from proceeding with said suit to determine the validity, or nonvalidity, of said confessed judgment, be, and the same are, hereby in all respects ratified and confirmed; to which action of the Court, E. V. Echols, Trustee, objected and excepted for reasons fully stated to the Court.

The Deputy Clerk at Lynchburg will certify and mail copies hereof to Hon. Julian K. Hickman, Referee in Bankruptcy, Harrisonburg, Va., E. V. Echols, Esq., 1332 Rugby Road, Charlottesville, Va., B. B. Woodson, Esq., 242 Court Square, Charlottesville, Va., Magruder Dent, Jr., Esq., Michael and Dent, 414 Park Street, Charlottesville, Va., Carl E. Hennrich, Esq., Court Square Building, Charlottesville, Va., William S. Aaron, Esq., 242 Court Square, Charlottesville, Va., and Robert

M. Musselman, Esq., 413 Seventh Street, Charlottesville, Va.

Enter:

/s/ A. W. BARKSDALE
United States District Judge.

A TRUE COPY, TESTE:
Leigh B. Hanes, Jr., *Clerk,*
by: /s/ Otway Petticrew
Deputy Clerk.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9142.

B. B. Woodson, Trustee in Bankruptcy for Sterling R. Decker and Mary Jane Decker, partners t/a Berkeley Community Builders,

Appellant,

versus

George Gilmer,

Appellee.

No. 9229.

E. V. Echols, Trustee in Bankruptcy, Albert Mahanes Company, Incorporated, Bankrupt,
Appellant,

versus

George Gilmer,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT CHARLOTTESVILLE. A. D. BARKSDALE, DISTRICT JUDGE.

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(Argued November 8, 1963 (No. 9142) and January 22, 1964 (No. 9229). Decided April 16, 1964.)

Before HAYNSWORTH, BOREMAN and BRYAN, Circuit Judges.

William S. Aaron, Jr., and Robert M. Musselman (Walker, Woodson and Aaron on brief) for Appellant in No. 9142, James H. Michael, Jr., (Magruder Dent, Jr., and Michael and Dent on brief) for Appellant in No. 9229, and Carl E. Hennrich for Appellee.

HAYNSWORTH, Circuit Judge:

The Referee in Bankruptcy refused to enjoin a creditor from prosecuting in a state court an action attacking state court judgments obtained by the Trustees. The District Court affirmed the Referee's action, and we, in turn, affirm his.

At the time of the bankruptcy, Dr. Decker, the bankrupt individual, claimed an indebtedness of some $37,000 due him on an open account by Commonwealth Utilities, Inc. Another of Decker's controlled corporations, Albert Mahanes Company, Inc., which was also in bankruptcy, claimed it was due some $22,000 by Commonwealth Utilities, Inc. Decker and his wife owned all but one of the shares of Commonwealth Utilities, Inc. On the relevant dates, Utilities was not in bankruptcy nor was it insolvent.

At the suggestion of the Referee in Bankruptcy, the Trustees of the individual, Decker, and of the corporation, Mahanes, filed actions in the state court against Commonwealth Utilities, Inc., seeking to reduce their open account claims to judgments. At the instance of the

Trustees and of the Referee, Decker, as President of Utilities, confessed judgments in those actions.

Decker's principal creditor, George Gilmer, owned one share of the stock of Utilities and was a large creditor of Utilities, as well as of Decker. He brought an action in the state court by which he sought to set aside the confessed judgments against Utilities and in favor of the Trustees in Bankruptcy. He did so without having previously obtained the permission of the Referee in Bankruptcy. The Referee, however, refused to enjoin Gilmer's prosecution of the state court action, stating that he thought Gilmer had a right to litigate that question in the state court.

On these appeals, it is contended that, under § 2 of the Bankruptcy Act, the jurisdiction of the Bankruptcy Court was exclusive and, without the previously obtained permission of the Referee, the state court is wholly without jurisdiction to entertain any proceeding affecting the security of the confessed judgments for the claims of the Trustees. The contention goes too far.

The jurisdiction of the Bankruptcy Court, insofar as it is necessary that it be exercised in the administration of the bankrupt estate, is exclusive. Nevertheless, many claims by or against the bankrupt estate are properly prosecuted in state courts. It is well settled that actions against the trustee may be brought in a state court, subject only to the approval of the Referee.[1] The question may be so clearly one for resolution in the state courts, that refusal of his permission and approval may be an abuse of the Referee's discretion.[2]

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1. Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 60 S.Ct. 628, 84 L.Ed. 876; Isaacs v. Hobbs Tie & T. Co., 282 U.S. 734, 51 S.Ct. 270, 75 L.Ed. 645.

2. Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 60 S.Ct. 628, 84 L.Ed. 876; Texas v. Donoghue, 302 U.S. 284, 58 S.Ct. 192, 82 L.Ed. 264; Marian Corporation v. Bray, 4 Cir., 235 F.2d 318.

The prosecution of unauthorized proceedings in the state court which would interfere with the bankruptcy court's administration of the estate may be enjoined.[3] It does not follow, however, that a state court is so completely lacking in jurisdictional power that it may not proceed to resolve an essentially state court question when the Referee's approval of the proceeding is granted after the state court action is commenced rather than before. The prohibition of the Bankruptcy Act goes to the state court's exercise of jurisdictional power rather than to the existence of the power itself.

There is no question but that the state court here has subject matter jurisdiction of an action collaterally attacking its own earlier judgments. It has *in personam* jurisdiction of the parties. If it lacked either, the Referee's approval could not supply the deficiency. The essential elements of jurisdictional power are there. Gilmer's is not an action *in rem*. The state court's jurisdictional power is not dependent upon its possession of any tangible *res*. The exclusive jurisdiction of the bankruptcy court to administer the bankrupt estate imposes implicit restrictions upon a state court's exercise of its jurisdictional power, but the limitations are not absolute for they are completey lifted by the Referee's approval, an approval he may not unreasonably withhold.[4]

The Referee was clearly of the opinion that Gilmer's attack upon the validity of the state court's judgments in favor of the Trustees presented questions peculiarly cognizable in the court which had rendered the judgments

3. 28 USCA § 2283. Before the 1948 revision, the only expressed exception to the anti-injunction statute was the bankruptcy exception. The 1948 revision, as disclosed by the Reviser's note, was intended to preserve the bankruptcy exception, to recognize the existence of other exceptions implicit in other acts of the Congress, and to overturn the result of Toucey v. New York Life Insurance Co., 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100.

4. See cases cited in Footnote 2.

under attack. Though it may even be doubted whether a bankruptcy court should undertake to exercise its jurisdiction to resolve such a question, the Referee's expression of his sense of appropriateness certainly has abundant justification.

Under these circumstances, the objection that his approval of the prosecution of Gilmer's state court action came after its commencement rather than before seems a minor quibble. Until the Referee's approval was obtained, Gilmer was not authorized to proceed, and further proceedings in the state court could be enjoined by the District Court. The Referee's approval, however, ratified what Gilmer had done. Since the state court was not wholly without jurisdictional power, the Referee's ratification of the institution of the action and his approval of its further prosecution, was complete authorization to Gilmer and the state court to proceed to judgment.

Affirmed.

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APPENDIX H

11 U. S. C. § 110 *Title to Property* (in pertinent part)

(a) The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks, and in applications therefor: *Provided,* That in case the trustee, within thirty days after appointment and qualification, does not notify the applicant for a patent, copyright, or trade-mark of his election to prosecute the application to allowance or rejection, the bankrupt may apply to the court for an order revesting him with the title thereto, which petition shall be granted unless for cause shown by the trustee the court grants further time to the trustee for making such election; and such applicant may, in any event, at any time petition the court to be revested with such title in case the trustee shall fail to prosecute such application with reasonable diligence; and the court, upon revesting the bankrupt with such title, shall direct the trustee to execute proper instruments of transfer to make the same effective in law and upon the records; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised solely for some other person; (4) property transferred by him in fraud of his creditors; (5) property, including rights of action, which prior to the filing of the petition he could by any means

have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered:.....